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U.S. BANKRUPTCY COURT

New Mexico

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Case Number: 03-01065-s
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Memorandum Opinion on Plaintiff's Motion for Summary Judgment (RE: related document(s)[106] Motion for Summary Judgment filed by Plaintiff Yvette J. Gonzales) (jeb)

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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW MEXICO

In re:
FURR'S SUPERMARKETS, INC.,
Debtor. No. 7-01-10779 SA

YVETTE J. GONZALES, TRUSTEE,
Plaintiff,
v. Adv. No. 03-1065 S

UNITED STATES POSTAL SERVICE, et al.,
Defendants.

MEMORANDUM OPINION ON PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT (doc 106)

This matter is before the Court on Plaintiff's Motion for Summary Judgment ("Motion")(doc 106), Amplex Corporation's ("Amplex") Response (doc 111), United States Postal Service's ("USPS") Response (doc 112) and Plaintiff's Reply (doc 117). This adversary proceeding to recover preferential transfers is a core proceeding. 28 U.S.C. § 157(b)(2)(F)[1]. The parties' representatives are listed in the service section below.

This Motion is the fourth motion for summary judgment filed in this case. The first was a Joint Motion by Defendants for Summary Judgment (doc 88). The second was Amplex's Second Motion for Summary Judgment (doc 96). The third was USPS's Second Motion for Summary Judgment (docs 107-108). Memorandum Opinions have now been entered on those three motions (docs 124, 126 and 128) as well as three Orders denying them. And, in a factually

[1]All statutory and rule references are to the Bankruptcy Code as it existed before the effective date of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.

related matter, Amplex filed an Application in the main bankruptcy case for an Order to Pay Secured and/or Administrative Expense Claims Resulting from Conversion of Consigned Collateral (Case 7-01-10779 SA doc 2498). The Court entered a Memorandum Opinion on the Administrative Expense Application (Case 7-01-10779 SA doc 3289) and an Order Denying the Application (Case 7-01-10779 SA doc 3290). This Memorandum Opinion incorporates all the undisputed facts found in the three earlier summary judgment Memorandum Opinions and facts in the Memorandum Opinion on Amplex's Application for Administrative Expense. In this Memorandum Opinion, if a fact referred to is from an earlier Memorandum Opinion, it will be identified as such. Otherwise, references to Facts are to those listed below.

In this Motion, the Plaintiff seeks summary judgment on her prima facie case of preference against the defendants. She also seeks summary judgment overruling Defendant's defenses. For the reasons set forth below, the Plaintiff's Motion will be granted.

SUMMARY JUDGMENT STANDARDS

Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. Bankruptcy Rule 7056(c). In determining the facts for summary judgment purposes, the Court may rely on affidavits made with personal knowledge that set forth specific facts otherwise admissible in evidence and sworn

or certified copies of papers attached to the affidavits. Fed.R.Civ.P. 56(e). When a motion for summary judgment is made and supported by affidavits or other evidence, an adverse party may not rest upon mere allegations or denials. Id. The court does not try the case on competing affidavits or depositions; the court's function is only to determine if there is a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986).

FACTS

The Court finds that the following facts:

1. On February 8, 2001 ("Petition Date"), Furr's commenced a Chapter 11 bankruptcy proceeding.

2. On December 19, 2001, the case converted to a chapter 7 case. Plaintiff was appointed the trustee on that date and continues in that capacity.

3. Amplex and USPS transacted business with Furr's in New Mexico[2]. The contract between USPS and Amplex was attached as an exhibit to the Joint Motion for Summary Judgment (doc 88) as Exhibit D. The contract between Amplex and Furr's, the "Stamp Consignment Agreement" ("SCA") was attached as an exhibit to the Joint Motion for Summary Judgment as Exhibit A. A summary of the

[2]USPS disputed this fact, but did not point to any contradictory evidence in the record. This is insufficient to place the fact in doubt. See Fed.R.Civ.Proc. 56(e).

SCA appears in the Administrative Expense Memorandum Opinion (Case 7-01-10779 SA doc 3289) at p.1 n.2.

4. The Court has jurisdiction over the subject matter herein and the parties to this action.[3]

5. This action is a core proceeding under 28 U.S.C. § 1334 and 28 U.S.C. § 157(b)(2)(F).

6. Venue is proper in this court.

7. Plaintiff claims that after November 9, 2000, Furr's paid USPS the amounts (the "Payments") set forth in Chart 1 attached to the Affidavit of Rachel Kefauver, attached to the Motion as Exhibit A. See Kefauver ¶6. Amplex benefitted from the Payments to the extent they reduced its contingent liability to USPS.[4]

8. Plaintiff also claims that Chart 1 reflects the new value provided by USPS/Amplex during the Preference Period, which new value reduced the claim against the Defendants from $415,800 to $174,600.[5] Based on the Payments, per Furr's records, and on new

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[3]Amplex disputed this fact. Amplex maintains that the statute of limitations had passed before it was brought into this suit and that the amendment adding them did not relate back. This was dealt with after an earlier trial. See Order, doc 63. Amplex does admit, however, that this is the law of the case.

[4]Amplex disputed the fact as proposed by Plaintiff, arguing that it received no payments. The Court changed the proposed fact to read as above. The Court resolved the issue of Amplex's status as a creditor in the Memorandum Opinion on Amplex's Second Motion for Summary Judgment (doc 126) at p.6.

[5]The proposed fact stated that the claim was reduced to $234,000. Amplex's Response pointed out an additional shipment (continued...)

values, per Amplex's invoice dates[6], the Court has computed the potential preference balance as follows:

DATE	PAYMENT	NEW VALUE	UNUSED	PREFERENCE
11/13/00	59,400			59,400
11/20/00	59,400			118,800
11/21/00	59,400			178,200
11/22/00		<59,400>		118,800
12/01/00		<59,400>		59,400
12/05/00	59,400			118,800
01/05/01		<61,200>		57,600
01/12/01	59,400			117,000
01/18/01	118,800			235,800
01/19/01		<61,200>		174,600

This chart demonstrates that only two checks are really at issue in this case, the ones from January 12 and 18, 2001. All previous preference balances had been reduced to zero by infusions of new value. In other words, the only material checks are the $118,800 January 18, 2001 check and $55,800 of the $59,400 January 12, 2001 check.

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[5](...continued)
to Furr's of $59,400 which was not included in the Chart 1, and Plaintiff conceded this amount in her Reply, at page 10.

[6]The Court notes that Amplex's Exhibit 15 is incorrect; the last three lines under "Balance of Possible Preference" are incorrect because the second payment was not added to the first payment. Exhibit 15 also omits the check that cleared on November 13, 2000. See Plaintiff's Reply (doc 117) Exhibit B.

9. Each of the Payments was made for or on account of an antecedent debt owed by Furr's to USPS and/or Amplex (the "Antecedent Debt").[7] Each antecedent debt is evidenced by an invoice sent to Furr's before each payment was made, and each invoice was for a delivery of postage stamps made to Furr's on or about the date of the invoice.

10. The Antecedent Debt was not a consumer debt.[8]

11. Based on Furr's accounting records, the Payments were made while Furr's was insolvent[9]. Kefauver ¶10.

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[7]Amplex denied that it was a creditor, claiming that the Plaintiff should be judicially estopped from so claiming. This issue was addressed in the Memorandum Opinion on Amplex's Second Motion for Summary Judgment (doc 126).

Similarly, USPS disputed this fact, but pointed to no evidence in the record in support. This is insufficient to place the fact in doubt.

[8]Both Amplex and USPS dispute this fact. However, the Court finds that it was not a consumer debt as a matter of law. 11 U.S.C. § 101(8) provides: "The term 'consumer debt' means debt incurred by an individual primarily for a personal, family, or household purpose." Furr's did not incur any debts for personal, family, or household purposes. This transaction involved the purchase of stamps for resale to the public.

To the extent that Amplex disputes that there even was a debt, this was addressed in the Memorandum Opinion on Amplex's Second Motion for Summary Judgment (doc 126). In that opinion, the Court found that Amplex was a creditor. Id. at 6. The Court also found that Plaintiff was not judicially estopped from claiming Amplex was a creditor. Id. at 5 n.2.

[9]Amplex disputes this fact. Amplex argues that Furr's was solvent, but provides no evidence of this fact. Amplex argues that one must add back all preferential payments made during the preference period to analyze whether a debtor is insolvent, and that the Trustee failed to do this. Amplex claims that if this had been done, over $80,000,000 would have been added back to the

(continued...)

12. The Payments were made within 90 days before the Petition Date.[10]

13. The Payments enabled USPS and/or Amplex to receive more than they would have received had this bankruptcy case at all times been a case under chapter 7 of the Bankruptcy Code, the Payments had not been made, and USPS and/or Amplex had received payment of the Antecedent Debt to the extent provided under the Bankruptcy Code.[11]

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[9](...continued)
estate, rendering it solvent. Amplex ignores the fact that if $80,000,000 of assets were added back, there would be an additional $80,000,000 of debts that would remain unpaid. This would not change the net worth of the debtor. Furthermore, a preference defendant may not just criticize the Plaintiff's accounting, but rather must come forth with specific evidence to overcome section 547(f)'s presumption that the debtor was insolvent on and during the 90 days immediately preceding the date of the filing of the petition. Whitaker v. Citra Trading Corp. (In re Int'l Diamond Exchange Jewelers, Inc.), 177 B.R. 265, 269 (Bankr. S.D. Ohio 1995)(citing Akers v. Koubourlis (In re Koubourlis), 869 F.2d 1319, 1322 (9th Cir. 1989). In sum, Amplex has not overcome the section 547(f) presumption.

[10]Amplex disputes this fact for lack of knowledge. This is insufficient to overcome the proposed fact. Fed.R.Civ.P. 56(e). Fireman's Ins. Co. Of Newark, New Jersey v. DuFresne, 676 F.2d 965, 969 (3rd Cir. 1982).

[11]Amplex disputes this fact. Amplex establishes that it never received any payments directly from Furr's. This misses the point. Every dollar paid to USPS reduced Amplex's contingent liability to the USPS. If no payments had been made, Amplex would have had to pay the entire outstanding balances to USPS and file a claim in the bankruptcy case for reimbursement. See Facts 46-53. See also Administrative Expense Memorandum Opinion at 3 and n.4. Even though Amplex had a security interest, on the petition date there were few, if any, stamps and little or no proceeds. Amplex would have been essentially unsecured and
(continued...)

[11](...continued)
receive nothing. See generally, Memorandum Opinion on Amplex's Second Motion for Summary Judgment (doc 126).

Second, Amplex claims that because this was a consignment agreement and Amplex was perfected, it would be entitled to payment in full. The Court has two responses.

First, the Court finds that this was a consignment only in name. Despite the SCA identifying Furr's as "consignee," "In a bona fide consignment transaction, no payment is made by the consignee to the consignor unless and until the consignee has sold the goods to a third party." United States v. Nektalov, 440 F.Supp.2d 287, 301 (S.D. N.Y. 2006). See also In re Lexington Appliance Co., Inc., 202 F.Supp. 869, 871 (D. Md. 1962):

> A consignment is generally defined as a bailment for care or sale, where there is no obligation to purchase on the part of the consignee. The presence or lack of an obligation to purchase or pay for the goods on the part of the consignee is the most important factor in determining whether the agreement may be termed a consignment, because, if the alleged consignee is absolutely bound in all events to pay for the goods unsold, even though title is reserved in the alleged consignor, the transaction is a sale, or at least a conditional sale.

and Fowler v. Pennsylvania Tire Co. (In re Martin), 326 F.2d 526, 532 (3rd Cir. 1964)("The prime distinguishing factor of a consignment as opposed to a sale is that after the goods have been delivered to the dealer, no obligation arises on the part of the dealer to pay for them."); McKenzie v. Roper Wholesale Grocery Co., 9 Ga. App. 185, 70 S.E. 981, 982 (Ga. Ct. App. 1911)

> [I]n determining whether a contract is to be construed as a conditional sale or construed as a consignment, many of the details of the transaction may be disregarded, except in so far as they may be more or less evidentiary of the one thing by which these two forms of contract are legally differenced-and that thing is whether the bailee upon receipt of the goods assumes liability for the purchase price.

Under the SCA Furr's had to pay for the stamps in 30 days whether they were sold or not. The SCA cannot be a true consignment.

Second, even if it were a consignment, once the stamps were sold and the proceeds commingled and dissipated the Defendants became unsecured creditors. In re Oriental Rug Warehouse Club, Inc., 205 B.R. 407, 411-12 (Bankr. D. Minn. 1997)(Consignor has burden of establishing that something constitutes identifiable

(continued...)

14. From 1994 until approximately June, 1999, Furr's generally paid its bills within stated terms or close to them, and had sufficient cash to do so.[12]

15. Between 1994 and mid-1999, Furr's ordinary course of business with its product vendors would be to order product from a vendor as needed, receive shipment of the product, receive an

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[11](...continued)
proceeds, through tracing. The tracing must show that the alleged proceeds arose directly from the sale of the collateral and that the proceeds cannot have arisen from any other source. If the proceeds were commingled, once the balance drops below the amount of the proceeds, then consignor's interest abates accordingly.) See also Sprehe v. Plazagal Int'l Corp. (In re Plazagal Int'l Corp.), 33 B.R. 47, 48-49 (Bankr. S.D. N.Y. 1983)(The case law is clear that in true consignment situations, the owner must trace the property involved; if proceeds are commingled with general funds and unidentifiable, tracing can no longer be accomplished.) This is true even if the debtor obtains the money by fraud. Merrill v. Dietz (In re Universal Clearing House Co.), 62 B.R. 118, 124 (D. Utah 1986).

In the instant case there were no separate records of stamp sales, so the Court does not know what Defendants could trace. Stamp sales were comingled in the general accounts, and drawn down to zero, or close to it, every night, with the cash going to the secured creditors. See Dunlap affidavit ¶¶ 3-5 (attached to Plaintiff's Response to Defendants' Joint Motion for Summary Judgment, doc 90). Therefore, the Defendants became unsecured.

USPS also disputes this fact, but points to no evidence in the record to support the dispute. This is insufficient to overcome it.

[12]Amplex claims that Plaintiff's proposed undisputed facts 14 through 40 are irrelevant to the case, and neither admitted them or disputed them. The Court finds they are relevant to the ordinary course of business defense asserted by both Defendants. Because neither Defendant specifically disputed these facts, they are deemed admitted by NM LBR 7056-1.

invoice for the product, process the invoice, and then pay the invoice with a check that was mailed within the agreed-upon payment terms, or close to them.

16. Between 1994 and mid-1999, Furr's vendors never or almost never made repeated calls to Furr's for payment, placed Furr's on credit hold, tightened Furr's credit limits, threatened to withhold shipment of goods, or took similar actions to collect past due amounts.

17. In general, Furr's cash flow situation worsened throughout 2000 until the Petition Date.

18. Furr's used certain accounts payable software called the "Lawson System" which is a system commonly used by retailers such as Furr's.

19. One aspect of the Lawson System is that it automatically generated a check to pay a vendor on the last day of the payment term contained in the system. Thus, for example, if Furr's owed USPS or Amplex on a particular invoice and the payment terms were net 30, then on the 30th day the Lawson System would generate a check to pay USPS or Amplex for the invoice.

20. As Furr's cash flow tightened, Furr's began the practice of holding check that were automatically printed by the Lawson System. The practice of holding checks due to cash flow constraints began as far back as late 1988 or early 1999. At first the check-holding was sporadic, and the checks were held

for only a short time. As time went on, the practice became more widespread, particularly after approximately October, 1999. By the late spring or early summer of 2000, Furr's was holding almost every check that was printed.

21. After the late spring or early summer of 2000, Furr's would hold checks until a decision was made to pay the vendor. Pending that decision, the printed but unmailed checks were put into a locked filing cabinet under Ms. Dunlap's supervision.

22. By late 1999 or early 2000, the number of checks that were held became so numerous that the accounts payable personnel could not keep track of them.

23. Ken Fine developed a software program to track the held checks. With his program, when a vendor called inquiring about payment, Fine or someone else in the accounting department could see how many checks were being held for that vendor.

24. If a check was held for too long, Furr's did not want to mail it to the vendor because the vendor likely would notice the date and discover that Furr's was holding checks. Therefore, beginning in late 1999 or early 2000, when Furr's finally determined to pay a vendor whose checks were being held, Furr's would void the check and issue a new check in the same amount, but with a current date.

25. By the late summer or fall of 2000, it became common knowledge in the vendor community that Furr's was not paying its

bills as agreed, and had cash flow problems. At about that time, vendors began in various ways to attempt to collect their past due amounts and reduce their exposure to the risk of nonpayment.

26. As a consequence, Furr's shelves at its retail stores began to get bare around the summer of 2000. The stock levels kept declining from the fall of 2000 to the Petition Date.

27. In general, if Furr's was out of stock with a vendor, it was because a vendor declined to make shipments to Furr's.

28. Furr's lost sales as a consequence of its stocking problems, which further reduced Furr's cash flow, creating a downward spiral into bankruptcy. Furr's was never able to restock its shelves to normal levels after mid-2000 until the Petition Date.[13]

29. At some point before September, 2000, Furr's senior management created an ad hoc committee to determine which vendors to pay what amount. The committee was composed of Steve Mortenson, Mario Chavez, Steven Smart, Steve Stork, Mike Fickling, and others. Meetings of the ad hoc committee were held regularly at least once a week, usually on Mondays.

[13]In addition to claiming this fact is irrelevant, Amplex affirmatively states that it delivered stamps as late as January 19, 2001. This does not really contradict the more general statement alleged by the Trustee, however.

30. Each Monday, Sandra Dunlap would estimate the cash receipts for the week. She would then give this figure to the ad hoc committee.

31. The ad hoc committee would decide on a week-to-week basis, and sometimes on a day-to-day basis, which products were the most needed, and would decide to pay vendors based on their assessment.

32. The formation of a group of senior management personnel to decide who to pay and who not to pay was a clear departure from Furr's past practices.

33. In the three or so months before the Petition Date, almost all of the payments Furr's made to product vendors were made because otherwise those vendors would not ship additional product to Furr's. Little or no cash was paid out to vendors that continued to ship to Furr's even though they were not getting paid.

34. Because Furr's ordinary course of business had changed from the historical "order and ship" to the new "ship only after payment" method, the number of payments made by wire transfer, overnight mail, or hand pick-up increased dramatically. The reason for this was to get the payment to the vendor as soon as possible, so product would be delivered as soon as possible. Before the fall of 1999, it was almost unheard of for Furr's to pay vendors other than by mailing checks.

35. The volume of calls Furr's received from vendors demanding payment increased dramatically over the course of 2000 and until the Petition Date. Before then, calls demanding payment were rare, if not unheard of.

36. By late 2000, most vendors had Furr's on "credit hold" or something similar, meaning that the vendors would not ship products to Furr's unless the vendor received a payment of some agreed-upon amount.

37. Before the fall of 1999, Furr's vendors never withheld shipments until a payment was received.

38. Before the fall of 1999, it was very unusual for Furr's senior management or merchandising personnel to be forced to deal with the credit department of Furr's vendors. By late 2000, Furr's senior management had to negotiate with vendors' credit departments on a daily basis.

39. After June, 2000, very few if any vendors were being paid on time. The only ones that were being paid timely were certain "critical vendors" whose products Furr's felt it had to stock, and who insisted on timely payment before shipping any more products to Furr's.

40. Furr's held, voided, and reissued each of the Payment Checks sent to USPS.

41. Plaintiff claims that Amplex placed Furr's on "credit hold."[14] The Court finds this fact disputed. It appears that, while Amplex threatened to do so, it actually did ship after the threat.

42. Amplex sent Furr's dunning letters during the Preference Period. Specifically, Amplex sent past due letters to Furr's on December 27, 2000 ($118,800 past due), January 4, 2001 ($178,200 past due) and January 17, 2001 (suspending stamp shipments). Memorandum Opinion on USPS 2nd Motion for Summary Judgment (doc 128) fact 19.

43. At least one of the Payment Checks (the last one, dated January 18, 2001) was sent by Federal Express.[15]

44. The checks Furr's sent to USPS/Amplex were not released until Furr's management met and determined that, among all of the Furr's creditors, the USPS should be paid.

45. Plaintiff claims that the Payments were substantially late.[16] This fact is disputed.

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[14]Amplex disputed this fact. See Amplex Response, ¶ 9 at 10.

[15]Amplex did not dispute this fact, as it had no evidence to the contrary. It argues, however, that this is a meaningless statement without knowing the history of how prior payments were sent. The Court agrees.

[16]Amplex disputed this fact. Amplex argues that Furr's payments were not "substantially late" relative to all of Furr's other payments to USPS. See Amplex Response, p. 11; Amplex Response, Exhibit 15-j.

46. Neither USPS or Amplex had a substantial secured claim on the Petition Date, because on that date Furr's had very few postage stamps on hand and very little if any proceeds from the sale of postage stamps.[17]

47. Based on Furr's accounting records, Chart 2 to the Kefauver Affidavit shows Furr's stamp sales per four-week period in 2000.[18]

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[17]Amplex disputed this fact. First, Amplex questions whether the Plaintiff has proved this fact. The Court finds that it has. Facts 47 to 52 below establish the deliveries of stamps and past sales rates. There is no other evidence in the record of stamps on hand at the petition date. To the contrary, no records exist that document this fact. Facts 47 to 52 are the best available evidence. Fact 46 is a logical conclusion derived from facts 47 to 52. As to cash proceeds on hand, see Dunlap affidavit ¶¶ 3-5 (attached to Plaintiff's Response to Defendants' Joint Motion for Summary Judgment, doc 90).

Second, Amplex claims that the amount of collateral on hand on the petition date is irrelevant; rather, it claims that the Court must look at its secured status at the time of each transfer. This is not the law. See Memorandum Opinion on Defendants' Joint Motion for Summary Judgment, doc 124, pages 8-10.

Third, Amplex claims that there is no need to trace payments. This is not the law either. See id. at 9-10. See also Oriental Rug Warehouse Club, 205 B.R. at 411.

Finally, all parties acknowledge that there is no record of stamps on hand or proceeds on hand on the petition date. Amplex's Administrative Expense Memorandum Opinion (Case 7-01-10779 SA doc 3289) p. 3. The stamps were never accounted for separately. Once Plaintiff came forward with the best evidence of these numbers, the burden shifted to Defendants to point to some admissible evidence that there is a genuine issue of fact. They have not done so.

[18]Amplex claims that Plaintiff's proposed undisputed facts 47 through 49 are irrelevant to the case, and neither admitted them or disputed them. The Court finds they are relevant to Defendants' secured status on the petition date. They are deemed (continued...)

48. The rate Furr's sold stamps during the last four periods of 2000 was an average of $3,252.89 per day.

49. Amplex shipped no stamps to Furr's in December, 2000.

50. Based on the past rate of stamp sales, Furr's likely ran out of stamps at some point in December, 2000.[19]

51. Given the past sales rate, the stamps shipped in January, 2001 would have been almost completely sold by February 8, 2001.[20]

52. Depending upon how long it took the stamps to arrive at headquarters and then get disbursed to the retail stores, the stamps on hand on the petition date would range from about $9,000 to about $23,000. Chart 3 to the Kefauver Affidavit shows the estimated number of stamps on hand on February 8, 2001 if it is assumed that Furr's began selling the stamps on the date shipped by Amplex. Chart 4 to the Kefauver Affidavit shows the estimated number of stamps on hand on February 8, 2001 (the Petition Date)

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[18](...continued)
admitted by NM LBR 7056-1.

[19]Amplex disputed this fact, claiming it is based on pure speculation. The Court disagrees. See footnote accompanying fact 46.

[20]Amplex disputed this fact. The Court finds that it is not disputed. See footnote accompanying fact 46.

if it is assumed that Furr's began selling the stamps five days after the date shipped.[21]

53. Amplex's last shipment of stamps to Furr's was made January 16, 2001, for stamps in the amount of $61,200.

54. This adversary proceeding was filed on January 30, 2003, a Thursday. The calendar week preceding the filing ended on January 24, 2003. The weekly average 1-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding the filing was 1.32%[22]. See 28 U.S.C. § 1961(a) (Describing how to calculate interest.)

DISCUSSION

STATUTES

Plaintiff seeks judgment under 11 U.S.C. § 547(b), which provides:

> Except as provided in subsection ©) of this section, the trustee may avoid any transfer of an interest of the debtor in property--
> (1) to or for the benefit of a creditor;
> (2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
> (3) made while the debtor was insolvent;
> (4) made--
> (A) on or within 90 days before the date of the filing of the petition;
> ...; and

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[21]Amplex disputes this fact. The Court finds that it is not disputed. See footnote accompanying fact 46.

[22]See http://www.federalreserve.gov/releases/h15/20030127 (Last visited October 3, 2006).

> (5) that enables such creditor to receive more than such creditor would receive if--
>
> (A) the case were a case under chapter 7 of this title;
>
> (B) the transfer had not been made; and
>
> ©) such creditor received payment of such debt to the extent provided by the provisions of this title.

Defendants seeks dismissal based on 11 U.S.C. § 547(c)(2)[23], the "ordinary course of business" defense, which provides:

> The trustee may not avoid under this section a transfer--
>
> ...
>
> (2) to the extent that such transfer was--
>
> (A) in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee;
>
> (B) made in the ordinary course of business or financial affairs of the debtor and the transferee; and
>
> ©) made according to ordinary business terms[.]

The respective burdens of proof of the parties are set forth in 11 U.S.C. § 547(g), which states:

> For the purposes of this section, the trustee has the burden of proving the avoidability of a transfer under subsection (b) of this section, and the creditor or party in interest against whom recovery or avoidance is sought has the burden of proving the nonavoidability of a transfer under subsection ©) of this section.

CONCLUSIONS OF LAW

Plaintiff has the burden of proof of establishing each element of section 547(b) by a preponderance of the evidence.

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[23]Plaintiff took into account all subsequent value credits in computing the preference balances, so 11 U.S.C. § 547(c)(4) is not at issue.

Lowery v. Manufacturers Hanover Leasing Corp. (In re Robinson Brothers Drilling, Inc.), 6 F.3d 701, 703 (10th Cir. 1993).

Once the trustee establishes the elements of Section 547(b), the transferee has the burden of establishing any affirmative defenses under Section 547(c) to avoidance of the transfer. 11 U.S.C. § 547(g); Clark v. Balcor Real Estate Finance, Inc. (In re Meredith Hoffman Partners), 12 F.3d 1549, 1553 (10th Cir. 1993), cert. denied, 512 U.S. 1206 (1994); Payne v. Clarendon Nat'l Ins. Co. (In re Sunset Sales), 220 B.R. 1005, 1018 (10th Cir. B.A.P. 1998). The creditor asserting the ordinary course of business defense (Section 547(c)(2)) has the burden of proving the defense by a preponderance of the evidence. Jobin v. McKay (In re M&L Business Machine Co., Inc.), 84 F.3d 1330, 1339 (10th Cir. 1996)(citing In re Meredith Hoffman Partners, 12 F.3d at 1553).

> The purpose of [the ordinary course of business defense] is to leave undisturbed normal financial relations, because doing so does not detract from the general policy of the preference section to discourage unusual action by either the debtor or his creditors during the debtor's slide into bankruptcy. See 11 U.S.C.A. § 547. "This section is intended to protect recurring, customary credit transactions that are incurred and paid in the ordinary course of business of the debtor and the debtor's transferee." 4 Collier on Bankruptcy, ¶ 547.10 (15th ed. 1991).

Sender v. Nancy Elizabeth R. Heggland Family Trust (In re Hedged-Investments Assoc., Inc.), 48 F.3d 470, 475 (10th Cir. 1995).

> On the one hand the preference rule aims to ensure that creditors are treated equitably, both by deterring the failing debtor from treating preferentially its most obstreperous or demanding creditors in an effort to

> stave off a hard ride into bankruptcy, and by discouraging the creditors from racing to dismember the debtor. On the other hand, the ordinary course exception to the preference rule is formulated to induce creditors to continue dealing with a distressed debtor so as to kindle its chances of survival without a costly detour through, or a humbling ending in, the sticky web of bankruptcy.

Fiber Lite Corp. v. Molded Acoustical Products, Inc. (In re Molded Acoustical Products, Inc.), 18 F.3d 217, 219 (3rd Cir. 1994). To be protected, a transfer must be ordinary both from the transferee's perspective and the debtor's perspective. In re Milwaukee Cheese Wisconsin, Inc., 112 F.3d 845, 848 (7th Cir. 1997)(citing Marathon Oil Co. v. Flatau (In re Craig Oil Co.), 785 F.2d 1563 (11th Cir. 1986)); In re Tolona Pizza Products Corp., 3 F.3d 1029, 1032 (7th Cir. 1993)("One condition is that payment be in the ordinary course of both the debtor's and the creditor's business.") See also H.R.Rep. No. 595, 95th Cong., 1st Sess 373 (1977), reprinted in 1978 U.S.C.C.A.N. 5787, 5874, 6329 (legislative history suggests that purpose of this section is to avoid unusual actions by either the debtor or its creditors).

Section 547(c)(2) encourages normal credit transactions and the continuation of short-term credit dealings with troubled debtors to stall rather than hasten bankruptcy. Logan v. Basic Distribution Corp. (In re Fred Hawes Organization, Inc.), 957 F.2d 239, 243 (6th Cir. 1992); Harrah's Tunica Corp. v. Meeks (In re Armstrong), 291 F.3d 517, 527 (8th Cir. 2002).

Failure to meet any of the three requirements of § 547(c)(2) results in denial of the defense. Id. The § 547(c)(2) defense is narrowly construed. Payne v. Clarendon Nat'l Ins. Co. (In re Sunset Sales, Inc.), 220 B.R. 1005, 1020 (10th Cir. B.A.P. 1998); Jobin v. McKay (In re M&L Business Machine Company, Inc.), 84 F.3d 1330, 1339 (10th Cir. 1996). "Preferences are disfavored, and subsection C makes [terms wholly unknown to the industry] more difficult to prove." Tolona Pizza, 3 F.3d at 1032.

There is generally no disagreement over the first requirement (i.e., § 547(c)(2)(A)) that a debt was incurred in the ordinary course of business of the debtor and the transferee; reported cases under § 547(c)(2) overwhelmingly focus on subsections (B) and ©). Under those sections the creditor must prove that the transfers were ordinary as between the parties (§ 547(c)(2)(B)), which is a "subjective test", and ordinary in the industry (§ 547(c)(2)(C)), which is an "objective test". Id.

Section 547(c)(2)(B)

> Courts consider four primary factors to determine if payments are ordinary between the parties as required under the subjective test set forth in subsection (B): (1) the length of time the parties were engaged in the transaction in issue; (2) whether the amount or form of tender differed from past practices; (3) whether the debtor or creditor engaged in any unusual collection or payment activity; and (4) the circumstances under which the payment was made.[24] These factors are typically

[24]The Tenth Circuit Court's fourth factor differs from some other courts' test, which is "whether the creditor took advantage (continued...)

> considered by comparing pre-preference period transfers with preference period transfers.

Sunset Sales, Inc. 220 B.R. at 1020-21.

> The relations of the debtor and the creditor are placed in a vacuum, and the transfer in question is assessed for its consistency with those relations. What is subjectively ordinary between the parties is answered from comparing and contrasting the timing, amount, manner and circumstances of the transaction against the backdrop of the parties' traditional dealings. The transaction is scrutinized for anything unusual or different.

Morris v. Kansas Drywall Supply Co. (In re Classic Drywall, Inc.), 121 B.R. 69, 75 (D. Kan. 1990)(Citations omitted). In other words, the Court compares the preference period to a prior period. The comparison should be with a period "preferably well before" the preference period, presumably before the Debtor started experiencing financial problems. Tolona Pizza Products, 3 F.3d at 1032. "Generally, the entire course of dealing is considered." Brown v. Shell Canada Ltd. (In re Tennessee Chemical Co.), 112 F.3d 234, 237 (6th Cir. 1997). See also Iannacone v. Klement Sausage Co. (In re Hancock-Nelson Mercantile Co.), 122 B.R. 1006, 1013 (Bankr. D. Minn. 1991)(Baseline period should extend back into the time before debtor became distressed.) Cf. Meridith Hoffman Partners, 12 F.3d at 1553

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[24](...continued)
of debtor's deteriorating financial condition." See, e.g., Sulmeyer v. Pacific Suzuki (In re Grand Chevrolet, Inc.), 25 F.3d 728, 731 (9th Cir. 1994).

(Ordinary business terms under section 547(b)(2)(C) are those "when debtors are healthy.")

Section 547(c)(2)(C)

Under § 547(c)(2)(C) "[t]he court here compares and contrasts the particular transaction against the 'practices' or 'standards' of the industry. A transaction is objectively ordinary if it does not deviate from industry norm but does conform to industry custom." Classic Drywall, Inc., 121 B.R. at 75.

> Ordinary business terms, as used in paragraph ©), is thought of as an objective test. Courts consider whether the payment is ordinary in relation to the standards prevailing in the relevant industry. The circuit courts are currently divided about how to determine whether a particular transaction falls within the confines of ordinary business terms. Three prevalent views have emerged. One view, espoused by the Second, Sixth, Seventh and Eighth Circuits, emphasizes the range of terms used by firms that are similar to the creditor. The Tenth Circuit follows a narrower definition of ordinary business terms, excluding extraordinary circumstances from consideration, such as collection practices that may be used when the debtor is financially unhealthy. The Third and Fourth Circuits take a middle ground, defining ordinary business terms on a "sliding-scale" approach that is based on the length of the relationship between the debtor and the creditor.

Ann van Bever, Current Preference Issues, 1 J. Small & Emerging Bus. L. 297, 306 (1997)(footnotes omitted).

In Meridith Hoffman Partners the Tenth Circuit discussed the term "ordinary business terms" used in § 547(c)(2)(C). 12 F.3d at 1553. The Court stated that "ordinary business terms" could

mean either 1) terms that creditors in similar situations would commonly use, even if the situation itself is extraordinary, or 2) terms that are used in usual or ordinary situations. Id. It adopted the latter meaning, and further elaborated that "[o]rdinary business terms therefore are those used in 'normal financing relations'; the kinds of terms that creditors and debtors use in ordinary circumstances, when debtors are healthy."[25] Id. (Emphasis added.) This interpretation raises difficulties for defendants because it makes irrelevant evidence of similar businesses' treatment of delinquent customers who are having financial problems.

PLAINTIFF'S PRIMA FACIE CASE

1. Furr's transferred an interest of the debtor in property to the creditors. It is undisputed that the payments were made from the proceeds of Furr's credit line with the secured creditors. Furthermore, USPS admitted there was no express trust for its

[25] This definition by the Tenth Circuit has been called "unique" because it flatly rejects both the "party-focused view" (court excludes late payments from preference attack when the manner and timing conform to the manner and timing of previous payments made and accepted between the parties) and the "industry-terms view" (court asks whether the manner and timing of the late payments conforms to the general and accepted methods of the parties' industry) adopted by the other circuits. Janet E. Bryne Thabit, Ordinary Business Terms: Setting the Standard for 11 U.S.C. § 547(c)(2)(C), 26 Loy. U. Chi. L.J. 473, 489-90, 496 (1995). In fact, the Tenth Circuit test set out in Meridith Hoffman Partners does accept the "industry-terms" view, although it refines that test by requiring that the behavior of healthy debtors be the measure of behavior. Id. at 1553.

benefit. Memorandum Opinion USPS's Second Motion (doc 128), p. 11. The Court found that there was no express or constructive trust for the benefit of Amplex. See Amplex's Administrative Expense Memorandum Opinion (Case 7-01-10779 SA doc 3289) pp. 10-16. Furthermore, any attempt by either Defendant to establish a trust-type or bailment-type relationship would fail because the proceeds became untraceable after they were comingled and the balances of the accounts were drawn down to zero. The stamps were not consigned. See note 10, above. The Court also finds that Furr's was not a "mere conduit" that funneled stamp proceeds to the USPS; Furr's had to pay for the stamps within 30 days of receipt, so the proceeds of any stamps previously paid for were Furr's to keep. Finally, the Court finds that Furr's was not an agent[26] of Amplex or USPS. See Texas Commerce Bank-El Paso, N.A. v. Marsh Media of El Paso (In re Carolin Paxson Advertising, Inc.), 938 F.2d 595, 598 (5th Cir. 1991)("The essential element of an agency relationship is the right of control. The alleged principal must have the right to control both the means and the details of the process by which the alleged agent is to accomplish his task. Absent proof of the right to control, only

[26]Although not argued in agency terms, the parties have argued consignment and bailment theories. These are agency relationships. In a true agency relationship, a transfer by an agent to its principal is not a voidable preference because it is a transfer of the principal's own property. Rine & Rine Auctioneers, Inc. v. Douglas County Bank & Trust Co. (In re Rine & Rine Auctioneers), 74 F.3d 854, 858 (8th Cir. 1996)

an independent contractor relationship is established.")(Citations omitted.)(Applying Texas law.)[27] Neither Amplex or the USPS documents indicate any control whatsoever over Furr's methods or details of selling stamps. Finally, Defendants have not provided any evidence that they have traced or can trace any proceeds from the stamps into the comingled accounts.

2. The transfers were to or for the benefit of a creditor. Amplex was a creditor. See Memorandum Opinion on Amplex's 2nd Motion for Summary Judgment (doc 126) at 6. USPS was a creditor, for two reasons. First, under its own documents and the SCA the USPS retained title to the stamps. The stamps were in possession of Furr's. This alone would give the USPS a claim against Furr's, at least until the stamps were paid for. Second, under the economic realities of the transaction USPS was supplying stamps to Furr's, through an intermediary, for sale to the public.

3. The transfers were for or on account of an antecedent debt owed by the debtor before such transfer was made. Fact 9.

4. The transfers were made while the debtor was insolvent. Under 11 U.S.C. § 547(f), Debtor was presumed insolvent. Defendants did not overcome this presumption. Fact 11.

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[27]The SCA provides that Texas law shall govern the transaction.

5. The transfers were made on or within 90 days before the date of the filing of the petition. Fact 12.

6. The transfers enabled Defendants to receive more than they would have received if the case were a case under chapter 7 of this title, the transfers had not been made, and the Defendants received payment of their debt to the extent provided by the provisions of Title 11. Fact 13.

7. Trustee has established a prima facie case under 11 U.S.C. § 547(b).

DEFENDANTS' DEFENSE

8. The subject transfers were in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the Defendants. As part of Furr's ordinary course of business it offered postage stamps for sale to the public. To supply those stamps it transacted with Amplex to arrange for delivery of stamps. Amplex was in the business of providing stamps to retailers under the Stamps on Consignment program. Furr's then had to pay for the stamps within 30 days under its contract with Amplex. Therefore, the debts were incurred in the ordinary course of business of the Debtors and Defendants. Defendants meet 11 U.S.C. § 547(c)(2)(A).

9. The payments were not made in the ordinary course of business or financial affairs of the debtor and the Defendants.

The Court applies the test set out in Sunset Sales, Inc. 220 B.R. at 1020-21: (1) the length of time the parties were engaged in the transaction in issue; (2) whether the amount or form of tender differed from past practices; (3) whether the debtor or creditor engaged in any unusual collection or payment activity; and (4) the circumstances under which the payment was made. These factors are typically considered by comparing pre-preference period transfers with preference period transfers.

For the purposes of this decision, the Court will accept Amplex's argument that Furr's was generally late, so that the preference period transfers were not "substantially late" in comparison to historical payments. However, reading Fact 8 in light of Fact 42 shows that there was unusual collection activity before the last two checks (which are the only ones at issue). Dunning letters were sent on December 27, 2000 (claiming $118,800), and January 4, 2001 (claiming $178,200 past due). This was followed by a payment on January 12, 2001 of $59,400. Then on January 17, 2001 Amplex sent a letter threatening to terminate deliveries. On January 18, 2001 Furr's paid $118,800. So, even if the payments were not substantially later than historical payments, it appears that Amplex was no longer willing to deal with Furr's if payments were not immediately brought current.

When looking at the circumstances under which the payment was made, it becomes clearer that these payments were not ordinary course of business transactions. See Facts 14 to 40. Furr's was in total chaos during the period leading up to the bankruptcy. It formerly had been a healthy entity, paying its debts on time or close to it. Then, starting a year before the filing cash flow problems arose, shelves became bare, Furr's was unable to pay its vendors, it started holding checks then voiding them and reissuing them to preferentially pay creditors that it found crucial to a continuance of the business, while not paying vendors that were either not complaining or who were less necessary. In fact, Furr's held USPS's checks and reissued them. This was not ordinary course of business. Defendants fail to satisfy 11 U.S.C. § 547(c)(2)(B).

10. The payments were not made according to ordinary business terms. In order to meet 11 U.S.C. § 547(c)(2)(C) the creditor must come up with evidence of what the ordinary business terms are for the industry. Defendants did not do this, other than one statement that other retailers sometimes paid late too. This is totally insufficient to establish a baseline from which to determine whether the transactions were made according to ordinary business terms. Defendants fail to satisfy 11 U.S.C. § 547(c)(2)(C).

PREJUDGMENT INTEREST

"In bankruptcy proceedings, the courts have traditionally awarded prejudgment interest to a trustee who successfully avoids a preferential or fraudulent transfer from the time demand is made or an adversary proceeding is instituted unless the amount of the contested payment was undetermined prior to the bankruptcy court's judgment." Turner v. Davis, Gillenwater & Lynch (In re Investment Bankers, Inc.), 4 F.3d 1556, 1566 (10th Cir. 1993), cert. denied, 510 U.S. 1114 (1994). See also Sigmon v. Royal Cake Co., Inc. (In re Cybermech, Inc.), 13 F.3d 818, 822 (4th Cir. 1994)("It is well-settled that bankruptcy courts have discretion to award prejudgment interest in § 547 preferential transfer actions, and to compute that interest from the date of demand for the return of the transferred funds.") Prejudgment interest is generally awarded if 1) the award would serve to compensate the injured party, and 2) the award is otherwise equitable. Investment Bankers, 4 F.3d at 1566. The award of prejudgment interest in a preference case "unquestionably" serves a compensatory purpose: to compensate the estate from the creditor's use of the funds that were wrongfully withheld from the estate during the pendency of the adversary proceeding. Id.; see also Milwaukee Cheese Wisconsin, 112 F.3d at 849 ("[P]rejudgment interest is an ingredient of full compensation.") It is equitable to award the interest when there was no dispute

as to the amount of the preferential payments. Investment Bankers, 4 F.3d at 1566.

In this case, the Plaintiff has consistently asked for a judgment for the $415,800 of payments, less new value that could be established by the Defendants. The amount has always been ascertainable. There is no evidence in the record that Plaintiff demanded a return of the funds before filing the adversary proceeding. Therefore, the Court will award prejudgment interest from January 30, 2003 at the rate of 1.32% to the date of the entry of the judgment in this case. The judgment will then accrue interest at the statutory rate.

SUMMARY

Plaintiff has shown that there are no material issues of fact with respect to her Motion for Summary Judgment as to her prima facie case for preferential transfers under 11 U.S.C. § 547(b) and to overrule Defendants' ordinary course of business defense under 11 U.S.C. § 547(c)(2). Prejudgment interest shall be awarded. Judgment will be entered accordingly.

Honorable James S. Starzynski
United States Bankruptcy Judge

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